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MICHAEL J. SULLIVAN
DIRECTOR

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AO-94-41

Ruth Bourquin, Esq.
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24 School Street, 3rd Floor
Boston, MA 02108

Re: Expenditures by Union to Oppose a Ballot Question

Dear Ms. Bourquin:

This letter is in response to your November 14, 1994 letter requesting an advisory opinion regarding a union's retainer of an attorney to provide legal advice in regards to a ballot question that the union would ultimately oppose. You have asked me to assume the following facts:

A labor organization pays its labor counsel a monthly retainer. Pursuant to the retainer, labor counsel is available to provide legal advice and services upon request from the union. The retainer is the same each month, regardless of the amount of time spent on the union's behalf during the month. For the purposes of this opinion, I also assume that the attorney's legal services may concern a wide variety of issues including political or referendum issues.

You further ask me to assume that in the course of a statewide election, an initiative petition pursuant to Article 48 of the Declaration of Rights is certified for the ballot. Its passage would directly affect members of the labor organization and is opposed by the union. Prior to the ballot question being actually qualified for the ballot, the union is contacted by the Secretary of State's office for assistance in drafting the "Against" statement that will appear in the Secretary's Information for Voters pamphlet. The union contacts its labor counsel who spends approximately ten hours drafting the statement and consulting with the Secretary's office. Most of these hours are spent before the ballot question qualified for the ballot. Union legal counsel received no additional remuneration for these services above and beyond the monthly retainer.

Based on this fact scenario you have asked four questions, which I will answer in order.

(1) <u>Has the union made an expenditure to oppose a ballot question?</u>

Yes. This office has consistently held that M.G.L. c. 55, the campaign finance law, applies to associations and organizations other than political committees which make

expenditures to promote or oppose a question submitted to the voters including expenditures made before a question has been certified or qualified to appear on the ballot. See OCPF-IB-88-01 and IB-90-02.

Specifically, in IB-90-02 the office, quoting advisory opinions issued in 1983 and 1984, stated that:

> "monies raised and spent in an effort to move forward [a question] which will influence the voters, such as a petition drive, are subject to the provisions of [M.G.L.] c. 55. It is not necessary that a question be legally certified as appearing on the ballot" (emphasis added.) Advisory Opinion, AO-83-13. Similarly, this office has stated that "it is not necessary that a question be legally certified as appearing on the ballot, but rather, a political committee may make expenditures in anticipation that a question will appear on a ballot" (emphasis added.) Advisory Opinion, AO-84-05. [IB-90-02, at page 1.]

Based upon this analysis, the bulletin concluded that contributions received or expenditures made to "originate an initiative petition, a referendum petition or a public policy petition shall be considered to have been made in order to influence or affect a question submitted to the voters." IB-90-02, at page 2. In the office's view the "act of origination in each instance shall be considered as the first step necessary to commence the process" which in the case of an initiative petition is "the drawing up and signing by ten qualified voters of an original petition."

Therefore, any contribution received or expenditure made after the "first step necessary" or the "act of origination" would be subject to the disclosure and reporting provisions of the campaign finance law. In particular, the office noted:

> For example, any monies expended by an organization in working with the Attorney General during the certification process undertaken by the Attorney General pursuant to Article 48 of the Amendments to the Constitution would be subject to the provisions of M.G.L. c. 55. [IB-90-02, at page 2.]

It follows, based upon the facts you have presented, that the expenditures made by an association in an effort to work with the Secretary of State's office during the qualification period are subject to the disclosure and reporting requirements of chapter 55 since the "act of origination" or the first step has already occurred. Therefore, any expenditures made by the union you represent during the certification or qualification period, including payments made for legal services, would be subject to M.G.L. c. 55. See also AO-91-04.[1]

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[1] Under the facts assumed the union would not have to organize and register as a political committee. However, it would have to report any such expenditures on the Report of Association, Organization or Other Group Expending for Ballot Questions (Form CPF 112), a copy of which is enclosed. See IB-88-01.

(2) How does the retainer arrangement affect the conclusion? Would the conclusion differ if the attorney were paid on an hourly basis for these services?

The retainer arrangement has no effect. Under the typical retainer arrangement which you have described, a client, in this case the union, agrees to pay the attorney a set amount on a periodic basis, i.e., monthly. This payment is due regardless of the extent or nature of the services actually provided, subject generally to certain exceptions. For example, the retainer may not include litigation costs. Therefore, one might argue that since the payment of the retainer has no particular purpose it is not an expenditure to promote or oppose a ballot question.

In the office's opinion, however, if services in connection with a ballot question are included within the scope of services covered by the retainer and such services are provided to "move forward [a question] which will influence the voters" an expenditure within the meaning of chapter 55 has been made and must be valued and reported as discussed below. Any other conclusion would not only be inconsistent with the disclosure provisions of the campaign finance law but would create a simple mechanism to avoid such disclosure.

Therefore, whether the union's expenditure for the attorney's services in working with the Secretary of State's Office are made through a retainer or on an hourly basis, a reportable expenditure has been made.

(3) Does the date of qualification of the question for the ballot affect the result?

No. As discussed above, since the question had already been certified, subsequent expenditures made to move the ballot question forward, including those made during the qualification period, would be subject to chapter 55.

(4) If the union's request of its counsel to perform these services does constitute an expenditure in opposition to a ballot question, how should the expenditures be valued? Is it appropriate to value the expenditure, if any, by multiplying the time spent by a reasonable hourly rate?

I recognize that there are various methods to value the expenditure and that one method may be more appropriate than another depending upon the context or purpose for the valuation. For the purposes of the campaign finance law, I recommend that the union value the expenditure as you have proposed, i.e., by multiplying the time spent by the attorney's usual or customary hourly rate. If the attorney has provided ten hours of service in connection with the ballot question, then those hours should be multiplied by the attorney's usual or customary hourly rate and reported as an expenditure in that amount on a Form CPF-112.

You also asked about another scenario in which union members are required by a private employer to do work or to refrain from certain activity in connection with a ballot question. Certain members of the union have been subject to work rules related to a ballot question which they believe

violate their constitutional rights to free speech and free elections. Specifically, some members are required to distribute literature advocating passage of the ballot question and another is ordered not to drive a car to work with a sign on it advocating defeat of the ballot question. The union has contacted legal counsel for advice on preparing lawsuits challenging these actions.

Approximately 50 hours are spent on these matter prior to the ballot question. Although the legal action does not relate directly to the ballot question, it generates publicity and counsel speaks to news reporters about the lawsuits. In particular, counsel states to a news reporter that the same kind of intimidation exerted by the employers which gives rise to the lawsuits is likely to be exerted by the employers over its workers if the ballot question passes.

The scenario you have described appears to be primarily a private legal matter concerning the rights of union members in the workplace and not a matter subject to the campaign finance law. However, if the purpose of the attorney's contact with the press is primarily to further the union's position on the ballot question rather than to promote the union's legal action, the union should report the hourly cost of that portion of the attorney's time spent promoting the union's position on the ballot question as an expenditure.[2]

This opinion has been rendered solely on the basis of representations made in your letter and solely in the context of M.G.L. c.55.

Please do not hesitate to contact this office should you have additional questions about this or any other campaign finance matter.

Sincerely,

Michael J. Sullivan
Director

MJS/cp
Enclosure

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2. If employees receive compensation from a corporation for work to support or oppose a ballot question the corporation may also have made a reportable expenditure. See Op. Atty. Gen. dated November 6, 1980 and AO-93-32. In addition, I note that such activity, may not comply with the requirements of M.G.L. c. 55, s. 16B as added by Chapter 43 of the Acts of 1994 which takes effect on January 1, 1995. See also M.G.L. c. 56, s. 33 as amended by section 44 of chapter 43 of the Acts of 1994.